



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 609 OF 2015

RIFT VALLEY RAILWAYS (K) LTD.....APPELLANT

- V E R S U S -

FRANCIS KEBASO NYANGAU.....RESPONDENT

(Being an appeal from the judgement and decree of Hon. Elizabeth Usui in Milimani CMCC No. 5407 of 2011 delivered on 30th November 2015.)

JUDGEMENT

1) Francis Kebaso Nyangau, the respondent herein, filed a compensatory suit against Rift Valley Railways (K) Ltd, the appellant herein, in the Chief Magistrate's Court, Milimani Commercial Courts, for the injuries he sustained when he was crushed by the appellant's train while he was alighting at Makadara rail stage on 13.2.2009. The appellant filed a defence to deny the respondent's claim.

2) The suit was heard by Hon. E. K. Usui, learned Senior Principal Magistrate who entered judgment in favour of the respondent and against the appellant in the sum of ksh.4,102,000/= plus costs and interest.

3) The appellant being dissatisfied filed this appeal and put forward the following grounds in its memorandum:

- i. The learned magistrate erred in law and fact by finding the appellant 100% liable for the accident on the 13th February 2009.*
- ii. The learned magistrate erred in law and fact by failing to find the respondent was liable for the causation of the accident on the 13th February 2009.*
- iii. The learned magistrate erred in law and fact by failing to apportion liability to the respondent when the appellant could not be entirely blamed for the accident on the 13th February 2009.*
- iv. The learned magistrate erred in law and fact by failing to take into account the submission of the appellant in the lower court on the issue of liability and quantum.*
- v. The learned magistrate erred in law and fact by awarding general damages of kshs.3,500,000 that are inordinately high and excessive so as to amount to an erroneous estimate.*
- vi. The learned magistrate erred in law and fact by making an award on the lost years of ksh.500,000 when the same was not pleaded.*
- vii. The learned magistrate erred in law and fact by making an award on artificial leg of ksh.100,000 when the same was not pleaded and proved.*
- viii. The learned magistrate erred in law and fact by taking into account irrelevant factors in awarding general damages.*

4) When the appeal came up for hearing, learned counsels appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions.

- 5) I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions. Though the appellant put forward a total of 8 grounds of appeal, those grounds revolve around the twin questions on liability and quantum. In the first four grounds of appeal, the appellant is questioning the decision to hold the appellant wholly liable for the accident.
- 6) It is the submission of appellant that the respondent did not discharge the burden of proof to the required standard in that the respondent did not prove that the appellant caused the accident. The appellant pointed out that the respondent failed to produce the train ticket to show that he was indeed a passenger in the appellant's train.
- 7) The appellant also argued that the respondent failed to summon an independent witness to corroborate his evidence. The appellant further pointed out that the witness statement of its witness Fredrick Karuiru, the driver of the train and the photographs were admitted showing the respondent hanging on the door side of the train at the time of the accident.
- 8) The appellant argued that the respondent jumped off the moving train when he noticed the presence of police officers to avoid being arrested.
- 9) The respondent opposed the appeal arguing that the appellant did not controvert his evidence.
- 10) The record shows that the respondent was the only witness who testified in support of this case while the witness statement of the appellant's train driver was admitted as the appellant's evidence in chief.
- 11) The respondent told the trial court that he boarded the appellant's train at 6.30am and was to alight at Makadara train stage. The respondent also stated that as he was alighting, the train driver set off the train in motion thus making the respondent slip and as a result the respondent's left leg was crushed and the respondent thrown on the ground. The respondent stated that his leg was eventually amputated.
- 12) In cross-examination the respondent disputed the allegation that he was hanging on the train as shown in the photographs admitted. The respondent denied he was the one shown in the photographs. Faced with the evidence, the learned Senior Principal Magistrate found that the train driver took off before ascertaining that all passengers had either alighted or boarded safely. The appellant was consequently found liable.
- 13) Having re-evaluated the evidence presented before the trial court, I am too convinced that the respondent discharged the burden of proof. I am convinced that the respondent was injured while alighting when the appellant's train driver set off the train before ascertaining that the respondent had safely alighted. Consequently, the learned Senior Principal Magistrate arrived at the correct decision on liability.
- 14) On quantum the appellant submitted that the trial magistrate erred in awarding the respondent ksh.3,500,000/= as general damages since the award is inordinately high and against the weight of evidence.
- 15) The appellant further stated that the trial court took into account irrelevant factors and also failed to consider the fact that the respondent contributed to his injuries and thus ought to be compensated moderately. The appellant proposed that an award of ksh.900,000/= to be adequate compensation.
- 16) The appellant also challenged the award of sksh.500,000/= as lost years and ksh.100,000/= as the cost of the artificial leg on the basis that they were not pleaded for. The award on special damages was also attacked as not proved.
- 17) The respondent is of the submission that the award of ksh.3.500,000/= as general is fair and in view of the fact that the respondent had asked to be awarded ksh.8 million.
- 18) The respondent further defended the award of ksh.500,000/= on lost years on the basis that the trial court considered relevant factors. The respondent stated that the award of 100,000/= for artificial leg was justified on the basis of the recommendation in the medical report of Dr. Wandugu which was produced in court. The medical report prepared by Dr. Wandugu indicates that the respondent sustained intestinal injuries, crush

injuries to the left lower leg with multiple fractures and crushed testicles. The doctor also noted that the injuries resulted into the amputation of the left lower leg and erectile dysfunction. In the trial court the respondent asked to be paid ksh.5,000,000/= for general damages.

19) The respondent cited the following cases:

i. Regina Mwikali Wilson vs= Stephen M. Gichuhi & another (2015)eKLR where the plaintiff was awarded ksh.2,500,000/= as general damages for fractures of both femurs.

ii. Patrick Mbatha Kyengo vs= Bayusuf Freighters Ltd (2013) eKLR where the plaintiff was awarded ksh.1,600,000 as general damages for crush injury with traumatic amputation of leg and a fracture of the radius and ulna.

iii. Geoffrey Mwaniki Mwinzi vs= Ibero (K) Ltd & Another (2014) eKLR in which the plaintiff was awarded ksh.2,500,000/= as general for a fracture of the left tibia and fibula.

The trial magistrate found the authorities in (ii) and (iii)above to be the most comparable.

20) The learned Senior Principal Magistrate however found the respondent's injuries to be more severe. The trial magistrate took into account the inflationary trends and settled at ksh.3,500,000/=. With respect, I am satisfied that the learned Senior Principal Magistrate considered all the relevant factors and arrived at the correct decision on general damages for pain and suffering.

21) The appellant has complained on the award of ksh.500,000/= as lost years. The record shows that plaintiff had told the trial court that he worked for Patco Co. Ltd but he did not produce any document to prove what he earned nor his age. The trial magistrate in the circumstances made a global award. With respect, I agree with the appellant that the learned Senior Principal Magistrate erred when making an award of ksh.500,000/= for lost years and ksh.100,000/= as the cost of artificial limb yet there was no prayer for such award in the plaint.

22) It was also clearly noted that the plaintiff had failed to tender evidence proving his earnings and age to establish the claim for lost years. Therefore there was no justification for the aforesaid awards.

23) In the end, the appeal as against liability is dismissed. However the appeal as against quantum partially succeeds in that the appeal as against the awards of ksh.500,000/= for lost years and ksh.100,000 for cost of artificial leg are set aside. However, the appeal against the award of ksh.3.500,000/= for general damages for pain and suffering is dismissed.

24) For the avoidance of doubt, the decision on appeal gives rise to the following orders:

i. The appeal against liability is dismissed.

ii. The appeal against the awards of ksh.500,000 for lost years and ksh.100,000/= as cost of artificial limb is allowed hence those awards are set aside.

iii. The appeal as against the award of ksh.3,500,000/= for general damages is dismissed hence the award is retained.

iv. The award of ksh.2,000/= as special damage is retained.

The net award on appeal is tabulated as follows:

- **General damages** ksh.3,500,000/=
- **Special damages** ksh. 2,000/=

Ksh.3,502,000/=

v. The respondent to have costs of the suit and appeal.

vi. The awards in (iii) and (iv) above to attract interest at court rates from the date of judgment of the trial court until full payment.

Dated, Signed and Delivered in open court this 9th day of November, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents